IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 47-79

LABOR RELATIONS BUREAU, A DIVISION OF THE DEPARTMENT OF ADMINISTRATION OF THE STATE OF MONTANA, Petitioner, - vs - BOARD OF PERSONNEL APPEALS, A DIVISION OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF MONTANA: AND MONTANA PUBLIC EMPLOYEES ASSOCIATION, Respondents.	Cause No. 47202 STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

* * * * * * * * * * * * * * * * * * *

It is hereby stipulated, by and between the parties above-named, through their undersigned Counsel of record, that this Cause may be dismissed, without prejudice. Each party is to pay their own costs and attorneys' fees.

Date: April 12 1984

Jayne Mitchell
Attorney for Petitioner
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Barry Hjort
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James Gardner
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* * * * * * * * * * * * * * * * * * *

ORDER

Pursuant to the foregoing stipulation, and good cause appearing therefore, it is hereby ordered that the foregoing cause be, and the same is, dismissed without prejudice, with the parties to pay their own costs and attorneys' fees.

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NOS. 47, 48, 49-79:

STATE OF MONTANA, LABOR RELATIONS BUREAU, Complainant in No. 47-79 Defendant in Nos. 48 & 49-79, - vs - MONTANA PUBLIC EMPLOYEES ASSOCIATION, Defendant in No. 47-79 Complainant in Nos. 48 & 49-79	)	FINAL ORDER

* *

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Jack H. Calhoun on June 16, 1980.

By an Order of this Board dated October 30, 1980, the cause was "remanded back to the Hearing Examiner to rule on the charge raised in ULP 47-79, and the Hearing Examiner was further instructed to review his decision in ULP Nos. 48 and 49-79 in light of his ruling in ULP 47-79 and the oral arguments presented to the Board by the parties."

On March 2, 1981, Hearing Examiner Jack H. Calhoun issued Amended Findings of Fact, Conclusions of Law and Recommended Order.

Exceptions to the amended decision were filed by the Montana Public Employees Association on March 25, 1981.

On July 24, 1981, oral argument was heard before the Board.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Hearing Examiner's Findings of Fact and Conclusion of Law holding that the state did not violate 39-31-401 (1) or (5) MCA by changing its vacation leave policy, be and hereby is affirmed

2. IT IS ORDERED, that the Hearing Examiner's Findings of Fact, and Conclusion of Law, holding that the union insisted to impasse on bargaining on a non-mandatory subject, be and hereby is overruled.

The basis for the Board's holding on this issue is as follows:

Prior to July 1, 1979, state law (59-907 (4), R.C.M., 1947) provided that,

> "(4) Anything relevant to the determination of reasonable classifications and grade levels for state employees shall be a negotiable item appropriate for the consideration of the state and exclusive representatives under the provisions of Title 59, Chapter 16."

Pursuant to the authority of 59-907 (4), and after the proper administrative process before this Board, this Board ordered the state to bargain with Montana Public Employees Association regarding the classification of computer data entry personnel who were represented by Montana Public Employees Association. The date of the Order was January 17, 1979.

The 1979 Montana Legislature repealed Section 59-907 (4), R.C.M., 1947, effective July 1, 1979. This Board is of the opinion that its Order of January 17, 1979, created an obligation on the part of the state and Montana Public Employees Association to bargain regarding the classification of that group of public employees, which could not subsequently be repealed by the Legislature. The right to bargain on that subject became a vested right which could not be taken away by a subsequent legislative repeal.

DATED this 28th day of August, 1981.

BOARD OF PERSONNEL APPEALS

John Kelly Addy, Chairman

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 31 day of August, 1981:

Sue Romney
Labor Relations Bureau
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Barry L. Hjort
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NOS. 47, 48, & 49-79:

STATE OF MONTANA, LABOR RELATIONS BUREAU, Complainant in No. 47-79 Defendant in Nos. 48 & 49-79, -vs- MONTANA PUBLIC EMPLOYEES ASSOCIATION, INC., Defendant in No. 47-79 Complainant in Nos. 48 & 49-79	AMENDED FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER

* *

The Findings of Fact, Conclusion of Law and Recommended Order issued on June 16, 1980 are, as ordered by the Board of Personnel Appeals, amended as indicated below.

With respect to ULP 47-79, the Board ordered that the hearing examiner rule on the charge raised. The prime question was whether the state had a continuing obligation to bargain under the order issued on January 17, 1979 by the Board after the legislature removed the requirement from the Act that "the state negotiate anything relevant to the determination of reasonable classifications and grade level..."

It seems clear that when the legislature repealed that part of the act it automatically changed it from a mandatory subject of bargaining to a permissive subject. However, MPEA contends that there still existed a duty to bargain under the old order because a right had vested from the first issuance of the order. I can find no support for their position. It would be unreasonable to hold that the legislature could not take away a right it has previously bestowed. As the state points out in its brief, the right

to bargain over classifications was a labor law right and, as such, one which the lawmakers could repeal at will. The union insisted to impasse on bargaining on a non-mandatory subject. There was no obligation on the part of the employer to bargain further once the repeal was effective. The state could bargain or not bargain on the subject as it saw fit.

The Board further ordered that I review my decision in ULP 48 and 49-79 in light of my ruling in ULP 47-79 and the oral arguments presented to the Board on September 30, 1980. I have reviewed the tapes of the arguments made and have, as I have noted above, ruled on ULP 47-79. I can only conclude that the strike was illegal and that the state acted within its rights. The change in vacation leave was not an unfair labor practice for the reasons discussed in my first recommended order.

A review of the whole record, including the tapes of the hearing does, however, raise some doubt about Finding of Fact No. 7. It was holiday pay which required that employees work the day before and the day after to be eligible for pay. In any case, the Finding in No. 7 is not essential to the conclusion drawn. It can be eliminated without affecting the outcome.

Dated this 2nd day of ~~February~~ March, 1981.

Jack H. Calhoun
Hearing Examiner

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 2nd day of March, 1981:

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Jennifer Jacobson

PAD4/G

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NOS. 47, 48, & 49-79:

STATE OF MONTANA, LABOR RELATIONS BUREAU, Complainant in No. 47-79 Defendant in Nos. 48 & 49-79, - vs - MONTANA PUBLIC EMPLOYEES ASSOCIATION, INC., Defendant in No. 47-79 Complainant in Nos. 48 & 49-79.	ORDER

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On June 16, 1980, the Hearing Examiner in this matter issued his Findings of Fact, Conclusions of Law and Recommended Order. The Hearing Examiner refused to rule on ULP 47-79 because it was moot. The Hearing Examiner dismissed ULP Nos. 48 and 49-79, finding that the State did not violate MCA 39-31-401(1) and (5) by changing its vacation leave policy. Exceptions were filed by both the State and Montana Public Employees Association, Inc. The State took exception to the dismissal of ULP 47-79 on the basis it was moot. At the oral argument it was disclosed that a pending arbitration between the parties could be affected by the decision on the issue in ULP #47-79. Montana Public Employees Association was in support of the Hearing Examiner deciding the issue raised in ULP 47-79.

IT IS THEREFORE ORDERED that this matter is remanded back to the Hearing Examiner to rule on the charge raised in ULP 47-79. The Hearing Examiner is further instructed to review his decision in ULP Nos. 48 and 49-79 in light of his ruling in ULP 47-79 and the oral arguments presented to this Board by the parties.

DATED this 30 day of October, 1980.

BOARD OF PERSONNEL APPEALS

By Brent Cromley
Brent Cromley, Chairman

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify and state that I mailed a true and correct copy of the above ORDER to the following persons on the 31 day of October, 1980:

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Jennifer Jacobson.

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS
IN THE MATTER OF UNFAIR LABOR PRACTICE NOS. 47, 48 and 49-79:

STATE OF MONTANA, LABOR RELATIONS BUREAU, Complainant in No. 47-79, Defendant in Nos. 48 & 49-79, -vs.- MONTANA PUBLIC EMPLOYEES ASSOCIATION, INC., Defendant in No. 47-79, Complainant in Nos. 48 & 49-79	FINDINGS OF FACT, CONCLUSION OF LAW AND RECOMMENDED ORDER

* * * * * * * * * * * * * * * *

I. INTRODUCTION

On December 19, 1979 the State filed an unfair labor practice charge alleging the Montana Public Employees Association violated 39-31-402(2) MCA by refusing to bargain collectively in good faith with the State. The Association filed charges against the State on December 19 and on December 20, 1979 alleging violations of 39-31-401(1) and (5) MCA. A hearing was conducted on March 11, 1980, under authority of 39-31-405 et seq. MCA, at which the State was represented by Mr. David Stiteler, the Association was represented by Mr. Barry Hjort.

II. ISSUES

1. Did the Association insist to impasse on bargaining on a permissive subject? Or, stated conversely, was the subject of classification for keypunch personnel a mandatory subject of bargaining after July 1, 1980?

2. Did the State commit an unfair labor practice when it changed its vacation leave policy during the course of a strike by the Association?

All sub-issues hinge on the answer to the above questions and are subordinate to those prime issues.

III. FINDINGS OF FACT

Based on the evidence on the record, the sworn testimony

of witnesses and the briefs submitted by counsel I find as follows.

1. On June 23, 1978 the Association filed unfair labor charges against the state alleging it had made certain unilateral changes in the classification system, which affected some of the employees represented by the Association, in controvention of the collective bargaining act. In Findings of Fact, Conclusion of Law and Recommended Order issued November 24, 1978 the hearing examiner found a violation and recommended an order requiring the State to cease and desist from refusing to bargain with the Association on the subject of classification for the affected employees. By its order on January 17, 1979 the Board of Personnel Appeals adopted the recommended order as its final order.

2. Prior to July, 1979 the Wage and Classification Act, Title 59, Chapter 9, RCM 1947, required the State to negotiate "anything relevant to the determination of reasonable classifications and grade levels for state employees..." During the 1979 session the Legislature deleted that requirement from the act affective July 1, 1979.

3. The parties met and negotiated approximately eight times. The first meeting was held in August, 1979. The last in October of that year. During the course of negotiations a tentative agreement was reached on some items, one being promotions; however, at the time impasse occurred five items were still on the table. They were: (1) grade assignments, (2) class specifications, (3) a committee to formulate documents, (4) training programs, and (5) rest breaks.

4. The State made no counter proposals on items 3, 4 or 5. The State negotiator indicated a possibility of fruitful discussion on them, if agreement could be reached on the first two items. At impasse the State negotiator told the negotiator for the Association the items were permissive subjects. The Association later filed a unilateral request for mediation listing the five items as unresolved

issues.

5. The unit represented by the Association (data entry operators, in the Departments of Highways, Social and Rehabilitation Services and the Employment Security Division) went on strike December 19, 1979. The parties had met several times with a mediator prior to the strike. Listed on the request for mediation were the five items in No. 3 above.

6. In a memorandum from the State Labor Relations Bureau to all employees of the affected agencies dated December 18, 1979 the State urged the employees not to strike, said it believed a strike would be illegal and informed them that vacation leave could not be used during a strike unless it was authorized prior to the start of the strike.

7. On about December 20, 1979 the State's Labor Relations Bureau Chief announced a new vacation leave policy for the striking employees. Such policy required employees who had vacation leave approved prior to the commencement of the strike to work the day before and the day after the approved leave to qualify for the leave. The State did not negotiate the change in policy with the Association.

8. The above policy was not applied to striking employees in SRS or Highways because the impact of the strike on those two departments was slight. However, it was applied to ESD because the strike had a more adverse effect there. Employment Security Division was having trouble getting its unemployment checks out on time.

9. The parties stipulated that MPEA would withdraw the vacation policy change grievance of Virginia Helfert, Thelma Flemming, Pat Wert and Nita Rasmussen and that the hearing examiner's decision in this matter will resolve the situation as it pertains to those individuals. They further agreed the hearing examiner had the authority to issue an appropriate remedy regarding the

changed policy including an order to make the four persons whole.

10. The changed vacation policy had an adverse impact on the striking employees. Some wanted to return to work.

11. The parties' contract, affective July 1, 1979 through June 30, 1980, provides that employees may take annual leave, with approval, at their discretion, if it does not cause an undue burden on the employer.

12. The parties entered into an agreement to submit the question of the proper classification and grade level of data entry personnel to an arbitrator for a decision which was to be final and binding. They did submit the matter and have received his decision.

IV. OPINION

In unfair labor practice No. 47-79 the State charged the Association with a violation of 39-31-402(2) MCA, failure to bargain in good faith. All three charges are inextricably connected with the bargaining order issued by this board in ULP 17-78, which required the State to bargain on classifications of keypunch (data entry) operators. The facts show that the parties have entered into an agreement to submit the question of classification to an arbitrator and that they have received the arbitrator's final and binding decision. Further, they have a negotiated collective bargaining agreement which is in effect. There is no chance that this question can reoccur or that the same incidents will be repeated. The traditional remedial orders issued in this type of situation would be meaningless and would provide no relief to the charging party, if the charge were found to be valid. For those reasons the question raised in ULP 47-79 is moot and will not be ruled on here.

The questions raised by MPEA in its charges against the State are not moot, however. The essential issue there was whether the

change in vacation leave policy made by the State during the strike was an unfair labor practice in violation of the Act, i.e., was there a unilateral change in wages, hours, fringe benefits or other conditions of employment which was not justified by business necessity.

The facts do not support a finding of a valid charge. The State admitted readily that it unilaterally postponed vacation leaves for some of the employees during the strike. It goes on, however, to contend that the change in policy was warranted by a business justification. I agree with that contention. The evidence shows that the postponing of vacations was related to a desire by the State to get unemployment checks out on time. The State's ability to function was impaired only in ESD and only in ESD did it implement the change. Vacations were not postponed in SRS or Highways. The collective bargaining agreement deals with the subject of annual leave and states it may be taken upon approval if it does not cause an undue burden on the State. On the basis of the language of the contract itself then, I find the postponement of leave by the State justified.

The remaining question, relative to the State's conduct in changing the leave policy, raised by the Association is whether such action was a violation of 39-31-401(1) MCA. Did the State's action amount to interference, restraint or coercion of the affected employees in their exercise of rights protected by 39-31-201 MCA? I am convinced it did not. Applying the facts in this case to the principle laid down in NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 65 LRRM 2465 where the Court said:

> From this review of our recent decisions, several principles of controlling importance here can be distilled. First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight" an antiunion motiviation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and

> substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which would have adversely affected employee rights to some extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him.

In Great Dane the company offered no evidence to support a legitimate motive finding and its denial of vacation payments to strikers was found to be discriminatory. Here the State did support, by evidence, its motive which was to get unemployment checks out to recipients on time. The change in policy was "motivated by legitimate objectives."

In NLRB v. Borden, 101 LRRM 2727 (1979) the 1st Circuit Court of Appeals reviewed the holding in Great Dane and went on to say:

> According to the teaching of Great Dane, where the employer's conduct is "inherently destructive" of employee rights, the Board can find an unfair labor practice, even in the face of an employer's evidence that it was motivated by business considerations and absent a showing of antiunion motivation. However, where the effect of the employer's discriminatory conduct is "comparatively slight," and where the employer offers legitimate and substantial business justifications for the conduct, then the Board must prove antiunion motivation. In Great Dane, the court, quoting NLRB v. Erie Resistor Corp., supra, 373 U.S. at 228, 231, stated that conduct is inherently destructive if it "carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent.' Id. at 33. The court did not reach a determination of whether the employer's discriminatory treatment of strikers was inherently destructive or comparatively slight because the employer offered no justification for its behavior. Where such a determination has been necessary, as for example in Portland Williamette Co. v. NLRB, 534 F.2d 1331, 92 LRRM 2113 (9th Cir. 1976), the Court looked to see whether the conduct had far reaching effects which could hinder future bargaining or whether the conduct discriminated solely upon the basis of participation in strikes or union activity. Id. at 1334. We do not view Borden's delayed payment of vacation benefits as conduct which bears its own indicia of intent carrying with it unavoidable consequences which the employer must have intended. This was, after all, a delay in vacation payments, not a refusal to pay at all.

The Court went on to remand the case to the Board so it could decide whether Borden had a legitimate and substantial business justification for its conduct and, if so, whether the purported justification was pretextual.

I must conclude that even in the absence of specific contract

language which, it appears, allowed it to take the action it took, the State's changed leave policy had only a slight impact on the employees' rights under the Act; and that, in any case, the action had a legitimate and substantial business reason, as proved during the hearing.

V. CONCLUSION OF LAW

1. The question raised in ULP 47-79 regarding the allegation that MPEA insisted to impasse on bargaining on a permissive subject and therefore violated 39-31-402(2) MCA is moot and will not be answered by this Board.

2. The State did not violate 39-31-401(1) or (5) MCA by changing its vacation leave policy.

VI. RECOMMENDED ORDER

That all charges in ULP 47, 48 and 49-79 be dismissed.

VIII. NOTICE

Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed within twenty days of service thereof. If no exceptions are filed with the Board of Personnel Appeals within that time, this Recommended Order shall become the Final Order of the Board. Exceptions shall be addressed to the Board of Personnel Appeals, Capitol Station, Helena, Montana 59601.

BOARD OF PERSONNEL APPEALS

By _____
Jack H. Calhoun
Hearing Examiner

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify and state that I did on the 16 day of June, 1980, mail a

true and correct copy of the above Findings of Fact, Conclusions of Law, and Recommended Order to the following:

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LeRoy Schramm, Chief
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STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

KARREN B. OLSON, Member of MONTANA EDUCATION ASSOCIATION, Complainant, vs. FORT PECK COMMUNITY COLLEGE, Defendent.	ULP # 50-79 ORDER

* *

On April 17, 1980, this Board issued a Notice of Hearing in the above matter setting the matter for hearing on May 15, 1980. On April 29, 1980, the Fort Peck Community College made a special appearance and moved for the dismissal of the matter. In its Motion to Dismiss the Community College alleged "that as a tribal community college chartered and operated by an Indian Tribe on its Reservation, it is not subject to state law or the authority of this Board", citing Fisher v. District Court, 424 U.S. 382 (1976) and Kennerly v. District Court, 400 U.S. 423 (1971). The Community College also cited Fort Apache Timber Company v. Construction Building Materials and Miscellaneous Drivers Local No. 83, Case 28-RC-3068, an NLRB decision holding that a tribally owned operation was not an employer within the meaning of the National Labor Relations Act. The Community College urged that this Board take the same position in this matter and determine it does not have jurisdiction.

In response to the Community College's Motion to Dismiss, the Complainant filed a Memorandum In Opposition to Motion to Dismiss, stating that a factual determination had to be made concerning the status of the Community College and that the statements made by the Community College in its Motion to Dismiss must be supported by affidavit pursuant to this Board's rule ARM 24.16.106.

On May 6, 1980, this Board issued an Order staying the hearing

in the matter and directing the Community College to submit the necessary affidavits to support its motion pursuant to ARM 24.16.106. On May 13, 1980, the Community College filed a Supplemental Memorandum in Support of Motion to Dismiss for Lack of Jurisdiction. Accompanying the Supplemental Memorandum were certified copies of the Charter and bylaws of the Fort Peck Community College and the Constitution of the Fort Peck Assiniboine and Sioux Tribes. An affidavit signed and sworn to by the Tribal Councilman, Caleb Shields, accompanied the Supplemental Memorandum.

From the accompanying affidavits, it is established that the Fort Peck Tribes are not organized under the Indian Reorganization Act. Rather, from Article II of the Tribe's Constitution the jurisdiction of the Tribe comes from an agreement entered into December 28 and 31, 1888 between the Tribe and the United States Government, and confirmed by the Act of May 1, 1888 (25 Stat. Sec. 113, Ch. 212). Under Article VII, section 4, the Tribe has given the Executive Board the power "To promote . . . education, . . ." Pursuant to that Power the Fort Peck Community College was established. Article II, section 1 of the Charter for the Community College states that the Board of Directors for the Community College shall be appointed by the Fort Peck Tribal Executive Board except for one, which shall be the Student Body President. Article V, section 1 provides that a Copy of the budget for the Community College shall be delivered and explained to the Tribal Executive Board before it is adopted. Article V, Section 2 provides that at least every six months the Board of Directors of the Community College shall report the business activities of the College for the preceding six months, including a complete financial statement.

From the above information there appears to be no question that the control of the Community College rests with the Fort Peck Tribal Executive Board; that the Community College is an entity of the Tribe.

Section 39-31-103 (1) MCA defines public employer as the state of Montana or any political subdivision thereof. This Board is certain the Complainant is not alleging that the Tribe is a subdivision of the State of Montana. Section 39-31-103 (2) MCA defines a public employee as a person employed by a public employer in any capacity. From the affidavits, an individual employed at the Community College is an employee of the tribe and therefore not a public employee. Therefore it is determined that this Board does not have jurisdiction in this matter as the Complainant is not a public employee as defined by 39-31-103 (2) MCA and the Defendent is not a public employer as defined by 39-31-103 (1) MCA.

IT IS ORDERED that this matter be dismissed for lack of jurisdiction.

DATED this 4th day of June, 1980.

BOARD OF PERSONNEL APPEALS

By Linda Skaar
LINDA SKAAR
Hearing Examiner

NOTICE

Pursuant to ARM 24.26.107, either party to this matter may file written exceptions to this Order stating specifically what issues are being excepted to and present briefs and oral argument to the Board of Personnel Appeals at a monthly meeting. If neither party files exceptions to this Order, then this Order shall become the FINAL Order of this Board. Said exceptions must be filed within twenty days after service of this Order.

CERTIFICATE OF MAILING

I, Linda Skaar, do hereby certify and state that I did on the 4th day of June, 1980, mail a true and correct copy of the above ORDER on ULP #50-79 to the following:

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LINDA SKAAR
Hearing Examiner

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